IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

Consolidated Case Nos. 80-289 and 80-692

UNITED MINE WORKERS OF AMERICA
LOCAL NO. 1854

and

UNITED MINE WORKERS OF AMERICA,
Petitioners

v.

NATIONAL LABOR RELATIONS BOARD

and

AMAX COAL COMPANY, A DIVISION OF AMAX, INC.,
Respondents

and

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

AMAX COAL COMPANY, A DIVISION OF AMAX, INC., ET AL.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the trustees of multiemployer trusts established pursuant to Section 302(c)(5) of the Labor-Management Relations Act, 1947, 29 U.S.C. §186(c)(5)(1978), function in the administration of those trusts as "representatives for the purposes of collective bargaining" within the meaning of Section 8(b)(1)(B) of the National Labor Relations Act, 29 U.S.C. §158(b)(1)(B)(1978).

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AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS CURIAE

Amicus curiae is the Board of Trustees of the United Mine Workers of America ("UMWA") Health and Retirement Funds ("Funds"). The Funds is the collective name for four irrevocable multiemployer trust funds established by the UMWA and the Bituminous Coal Operators' Association, Inc. ("BCOA") in Article XX of the National Bituminous Coal Wage Agreement of 1974 ("1974 Wage Agreement"), pursuant to, and within the scope of, Section 302(c)(5) of the Labor-Management Relations Act, 1947 ("LMRA"), 29 U.S.C. 186(c)(5)(1978). The four trusts are the UMWA 1950 Pension Trust, the UMWA 1974 Pension Trust, the UMWA 1950 Benefit Trust, and the UMWA 1974 Benefit Trust ("Trusts"). Article XX of the National Bituminous Coal Wage Agreement of 1978 ("1978 Wage Agreement") provides for the continuation of the Trusts as amended by the UMWA and the BCOA. The Trusts are employee benefit plans within the meaning of Section 3(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1002(3)(1978).

Article XX, Section (e) of the Wage Agreements provides for the administration of the Trusts by a Board of three Trustees appointed for the duration of the Wage Agreements and subject to removal only for cause. Pursuant to the Wage Agreements, and in accordance with Section 302(c)(5)(B) of the LMRA, one Trustee is appointed by the UMWA, one by the BCOA, and the third, a neutral, by the other two. The current Trustees of the Trusts are Harrison Combs, Chairman, appointed by the UMWA; John J. O'Connell, appointed by the BCOA; and Paul R. Dean, the neutral Trustee.

The powers and responsibilities of the Trustees are enumerated in the Trust documents. Under those documents, the Trustees have full discretionary authority to manage and control Trust assets. In that respect, the Trustees are plan fiduciaries within the meaning of Section 3(21)(A) of ERISA, 29 U.S.C. §1002(21)(A). Accordingly, the fiduciary duties imposed by Section 404 of ERISA, 29 U.S.C. §1104, and the prohibitions of Section 406 of ERISA, 29 U.S.C. §1106, fully apply to the Trustees. A Trustee who breaches the fiduciary obligations imposed by those provisions is personally liable under Section 409 of ERISA, 29 U.S.C. §1109, for any resultant losses to the Trust. Under Section 405 of ERISA, 29 U.S.C.

§1105, a Trustee is also liable for a breach of fiduciary duty by a co-Trustee, if he has knowledge of the breach.

The Third Circuit has decided that the UMWA and BCOA Trustees of the Funds (hereinafter "the Trustees") are representatives of their appointing parties for the purpose of collective bargaining, within the meaning of Section 8(b)(1)(B) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §158(b)(1)(B)(1978). The Trustees, however, cannot assume that status consistent with the fiduciary obligations imposed upon them by Sections 404 and 406 of ERISA. Consequently, the decision of the Third Circuit places the Trustees in a virtually untenable position. Indeed, the decision exposes the Trustees to substantial liability under Sections 405 and 409 of ERISA. Clearly, the Trustees have a serious interest in having the Supreme Court reverse that decision.

STATUTORY PROVISIONS INVOLVED

The following provisions of ERISA are relevant to the interest of the *amicus curiae* in this case:

Section 404(a)(1)(A), 29 U.S.C. §1104

> (a)(1) Subject to sections 403(c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> > (A) for the exclusive purpose of:
> > (i) providing benefits to participants and their beneficiaries. . . .

Section 405(a)(3), 29 U.S.C. §1105

> (a) In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:
>
> . . .
>
> (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

Section 406(b)(2), 29 U.S.C. §1106

(b) A fiduciary with respect to a plan shall not—

. . .

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries. . . .

Section 409(a), 29 U.S.C. §1109

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of Section 411 of this Act.

The following provision of the LMRA is relevant to the interests of the *amicus curiae* in this case:

Section 302(c)(5), 29 U.S.C. §186

(c) The provisions of this section shall not be applicable . . . (5) with respect to money or any other thing of value paid to a trust fund . . . for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, that . . . (B) . . . employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon. . . .

The following provisions of the NLRA are also involved in this case:

Section 8(b)(1)(B) and (b)(3), 29 U.S.C. §158

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce . . . (B) an employer in the

> selection of his representatives for the purposes of collective bargaining or the adjustment of grievances. . . .
>
> . . .
>
> (3) to refuse to bargain collectively with an employer. . . .

STATEMENT OF THE CASE

The UMWA, petitioner herein, is an industrial union that represents bituminous coal miners throughout the United States and Canada for the purposes of collective bargaining and contract administration.

The respondent, Amax Coal Company, a division of AMAX, Inc. ("Amax"), operates several bituminous coal mines in the midwestern United States. With regard to those mines, Amax is a member of the BCOA, an employers' association which represents bituminous coal operators for purposes of collective bargaining and contract administration. Amax, however, also operates a western sub-bituminous mine. That mine is not within the scope of the BCOA's representation.

In 1974, the UMWA and the BCOA engaged in collective bargaining negotiations which resulted in the adoption of the 1974 Wage Agreement and the establishment therein of the four trust funds, known collectively as the Funds. As a member of the BCOA, Amax participated in the negotiations leading to the adoption of the Wage Agreement and had a voice in the selection of the employers' Trustee.

Amax's western sub-bituminous mine was not covered, however, by the 1974 Wage Agreement. Nor was the mine covered by the Western Surface Coal Mine Wage Agreement of 1975, a separate agreement negotiated by the UMWA and an employer association representing western sub-bituminous and lignite mines. Instead, Amax and the UMWA negotiated directly for an agreement covering Amax's western mine. This case arose from those negotiations.

Included in the contract proposals submitted by the UMWA was a provision known as the "Trustee Clause." The Trustee Clause would have required Amax to participate in the Funds. Amax repeatedly objected to the Clause, on the basis that the Funds' management trustee had already been selected during the negotiations of the 1974

Wage Agreement. The UMWA, however, insisted to impasse upon the Trustee Clause.

In Amax's view, the UMWA's insistence upon the Trustee Clause constituted coercion in its selection of a collective bargaining representative within the meaning of Sections 8(b)(1)(B) and 8(b)(3) of the NLRA. Accordingly, in January, 1975, Amax filed an unfair labor practice charge against the UMWA and Local 1854 with the National Labor Relations Board ("Board"). Thereafter, the Director of Region 27 of the Board issued an amended consolidated complaint on behalf of the General Counsel of the Board. The complaint alleged, *inter alia*, that the UMWA had engaged in an unfair labor practice within the meaning of Sections 8(b)(1)(B) and 8(b)(3) of the NLRA, by insisting to impasse on the Trustee Clause.

A hearing on the charges was held on various dates in June and July of 1976, before an Administrative Law Judge. On March 22, 1977, the Judge issued a decision concluding, in relevant part, that the Funds' Trustee appointed by the BCOA is not a representative for purposes of collective bargaining as that term is used in Section 8(b)(1)(B) of the NLRA, and recommending the dismissal of that part of the complaint alleging that the UMWA had violated Sections 8(b)(1)(B) and 8(b)(3) of the NLRA. The Board affirmed this conclusion and recommendation as part of its decision and final order issued on September 29, 1978.

Amax and the UMWA petitioned the Third Circuit for review of the Board's entire decision and order. The Board petitioned the Third Circuit for enforcement of its order. Amax intervened in the UMWA petition, and the UMWA intervened in the Amax petition. The cases were subsequently consolidated on appeal.

The case was argued before Circuit Judges Gibbons and Higginbotham and District Judge Ziegler of the United States District Court for the Western District of Pennsylvania. The decision of the Court, in which Judge Gibbons did not participate, appears in an opinion written by Judge Higginbotham and filed on February 1, 1980. That decision reverses, in part, the decision of the Board, by holding that the Trustees of the Funds are collective bargaining representatives within the meaning of Section 8(b)(1)(B) of the NLRA, and that the UMWA's insistence to impasse upon the Trustee Clause therefore violated Sections 8(b)(1)(B) and 8(b)(3) of the NLRA.

The UMWA, Amax and the Board each petitioned the Third

Circuit for rehearing *en banc*. The petitions were denied on May 29, 1980. The UMWA petition to the Supreme Court for a writ of certiorari followed. *Amicus curiae* supported the UMWA petition insofar as it requested the Supreme Court to review the Third Circuit's decision that the Trustees are collective bargaining representatives.

Subsequently, the Board petitioned the Supreme Court for review of the Third Circuit's decision limited to the question of whether the Trustees are collective bargaining representatives. The Board's petition was granted, and the UMWA petition was granted insofar as it related to the question of whether the Trustees are collective bargaining representatives within the meaning of Section 8(b)(1)(B) of the NLRA. The cases were consolidated for briefing and argument.

SUMMARY OF ARGUMENT

The decision of the Third Circuit that the Trustees of the Funds are collective bargaining representatives is contrary to the intent of Congress as expressed in Section 302(c)(5) of the LMRA and in ERISA.

The sole purpose of Section 302(c)(5) of the LMRA is to ensure that collectively bargained employee benefit funds are established and administered as legitimate trust funds, free from the labor-management politics inherent in collective bargaining. Indeed, the courts that subsequently construed Section 302(c)(5) invariably concluded that the trustees of funds established thereunder may not act solely in the interest of their appointing parties, as collective bargaining agents are required to do. Instead, the courts have consistently found that such trustees have an independent and overriding fiduciary duty to act solely in the interest of the beneficiaries of the trust funds they administer.

Consistent with the judicial decisions under Section 302(c)(5), ERISA requires trustees to act "solely in the interest of" the beneficiaries of the trusts they administer. 29 U.S.C. §1104(a)(1)(A)(i). Indeed, Section 406 of ERISA specifically prohibits trustees from acting in the interest of their appointing parties, as collective bargaining representatives are required to do. 29 U.S.C. §1106(b)(2).

The two-judge panel of the Third Circuit ignored these provisions, and misconstrued the judicial decisions which they affirm,

in erroneously deciding that trustees of funds established under Section 302(c)(5) are collective bargaining representatives of the parties who appoint them. If allowed to stand, this decision would have serious adverse consequences for the trustees of multiemployer trusts established under Section 302(c)(5). Indeed, the decision would subject trustees to inherently conflicting duties and liabilities and, therefore, preclude effective administration of the trusts. Moreover, the decision would threaten the continued existence of multiemployer trusts.

ARGUMENT

The trustees of multiemployer trusts established pursuant to Section 302(c)(5) of the LMRA do not function in the administration of those trusts as "representatives for the purposes of collective bargaining" within the meaning of Section 8(b)(1)(B) of the NLRA.

Section 302(c)(5) of the LMRA requires that employers and employees be equally represented "in the administration of" the trusts established thereunder. 29 U.S.C. §186(c)(5)(B). The Section refers to the trustees of such trusts as "representatives" of the employers and employees who appoint them. The Third Circuit construed the term "representatives" under Section 302(c)(5) to be "representatives for the purposes of collective bargaining" under Section 8(b)(1)(B) of the NLRA. Trustee representation of employers and employees "in the administration of" a Section 302(c)(5) trust is not, however, tantamount to representation "for purposes of collective bargaining" within the meaning of Section 8(b)(1)(B) of the NLRA. *See Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Company,* 404 U.S. 157, 170 (1971); *United States v. Ryan,* 350 U.S. 229, 305 (1956). This is readily apparent from the purpose of Section 302(c)(5) as revealed by the legislative history. *United States v. Ryan, supra,* 350 U.S. at 305.

The enactment of Section 302(c)(5) was precipitated by UMWA collective bargaining demands "for the establishment of a welfare fund to be financed by employers' contributions and administered exclusively by union officials." *Arroyo v. United States,* 359 U.S. 419, 426 (1959); 93 Cong.Rec. 4678 (1947); *see also United States v. Ryan, supra,* 350 U.S. at 304-305. Congress was particularly

concerned with preventing the fund from becoming a union "war-chest," usable "for any purpose . . . to the advantage of the union." 93 Cong.Rec. 4746-47 (1947); *Arroyo v. United States, supra,* 359 U.S. at 426. Consistent therewith, Congress intended to ensure that employee welfare funds are established as "legitimate trust funds," used for "specified benefits to the employees of employers who contribute to them," and free from the abuses inherent in unilateral union administration. 93 Cong.Rec. 4678, 4746-47 (1947); *see also* 93 Cong.Rec. 3562-66, 3634 (1947); *United Marine Division I.L.A., Local 333, A.F. of L. v. Essex Transportation Co.,* 216 F.2d 410, 411-412 (3d Cir. 1954); *Blankenship v. Boyle,* 329 F.Supp. 1089, 1094-1095 (D.D.C. 1971), *aff'd mem.,* 511 F.2d 447 (D.C.Cir. 1975). Accordingly, Congress provided, in Section 302(c)(5), that payments to welfare funds would be permitted only if the payments were held in "trust fund[s]" for the "sole and exclusive benefit of the employees," and employers were equally represented "in the administration of" the trusts. *Id.*; 29 U.S.C. §186(c)(5).

It is obvious from the legislative history and the language of Section 302(c)(5) that Congress intended trust funds established thereunder to "be separate and apart from the union and employer creating the trust." *Lewis v. Seanor Coal Company,* 256 F.Supp. 456, 461 (W.D. Pa. 1966), *aff'd,* 382 F.2d 437 (3d Cir. 1967), *cert. denied,* 390 U.S. 947; *see United Marine Division, etc. v. Essex Transportation Co., supra,* 216 F.2d at 411-412. Indeed, Section 302(c)(5) was "designed expressly to isolate . . . welfare funds from labor management politics." *Blankenship v. Boyle, supra,* 329 F.Supp. 1094. Consistent therewith, Congress did not intend the trustees of Section 302(c)(5) trust funds to be collective bargaining representatives within the meaning of Section 8(b)(1)(B) of the NLRA. Rather, Congress intended them to act as fiduciaries in the sole interest of the funds' beneficiaries. *Blankenship v. Boyle, supra,* 329 F.Supp. 1094; *see* 93 Cong.Rec. 4678 (1947).

Any doubt about this fact is resolved by the judicial decisions construing the term "representatives" in Section 302(c)(5) of the LMRA. Significantly, after considering the legislative history of Section 302(c)(5), the Third Circuit concluded in an earlier case that:

> These trustees [of a Section 302(c)(5) trust fund] were not, in our judgment, representatives of the employees. They were trustees of a welfare fund. It is true that they were chosen half

> and half by the employers' association and this union. But we think that when set up as a board, as they were in this case, these individuals are not acting as representatives of either union or employers. They are trustees of a fund and have fiduciary duties in connection therewith as do any other trustees. [*United Marine Division, I.L.A., Local 333, A.F. of L. v. Essex Transportation Co., supra,* 216 F.2d at 412.]

Based upon that conclusion, the Court held that payment to the trustees of a Section 302(c)(5) welfare fund by an employer who was not a member of the employer association which appointed the management trustee was not an illegal payment to "any representative" of the employers' employees within the meaning of Section 302(a) of the LMRA. *Id.* at 413.

The District Court for the District of Columbia similarly construed Section 302(c)(5) in a case involving the Trustees of the UMWA Welfare and Retirement Fund of 1950 (" 1950 Fund"), the predecessor of the Funds. In *Blankenship v. Boyle, supra,* the Court rejected the argument that trustees, as "representatives" of labor and management, may act in the interest of their appointing parties and expressly found that:

> . . . there is nothing in the Labor-Management Relations Act or other federal statutes or in their legislative history which can be said to alleviate the otherwise strict common-law fiduciary responsibilities of trustees appointed for employee welfare or pension funds developed by collective bargaining.
> [*Blankenship v. Boyle, supra,* 329 F.Supp. at 1094. *Accord, United Marine Division, I.L.A., Local 333, A.F. of L. v. Essex Transportation Co., supra,* 216 F.2d at 412.][1]

Based on that rationale, the Court held that the Trustees of the 1950 Fund breached their fiduciary duty by failing to act in the exclusive interest of the beneficiaries of the Fund. *Id.* at 1094-95.

In *Miniard v. Lewis,* 387 F.2d 864 (D.C.Cir. 1967), *cert. denied,* 393 U.S. 873 (1968), another case involving the Trustees of the 1950 Fund, the District of Columbia Circuit rejected a claim of unfair representation against the UMWA Trustee on the basis that the

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[1] Well established common law principles require a trustee to "display throughout the administration of the trust complete loyalty to the interests of the beneficiary and [to] exclude all selfish interests and all consideration of the interests of third persons." Bogert, *Trusts and Trustees,* §543 (2d revised ed. 1978).

Trustee was not a collective bargaining representative. In rejecting the claim, the Court stated:

> Even though the fund here resulted from bargaining between the employers and the union, we believe that the traditional duty owed by a union to its members is not applicable. Rather, the trustees' duties are those of fiduciaries because *as trustees* they perform a separate function and do not act as representatives of either the employers or the union. [*Miniard v. Lewis, supra,* 387 F.2d at 865, n.5; *accord, United Marine Division, I.L.A., Local 333, A.F. of L. v. Essex Transportation Co., supra,* 216 F.2d at 412; *Morgan v. Laborers Pension Trust Fund,* 433 F.Supp. 518, 530 (N.D. Cal. 1977).]

Other courts have similarly delimited the scope of trustee representation under Section 302(c)(5) of the LMRA. As "representatives," trustees may consider and, in their discretion, adopt recommendations of the collective bargaining parties "pertinent to effective administration of the [f]und." *Toensing v. Brown,* 528 F.2d 69, 72 (9th Cir. 1975). Trustees may not, however, be bound by those recommendations. *Toensing v. Brown, supra,* 528 F.2d at 72; *Lamb v. Carey,* 498 F.2d 789, 794 (D.C.Cir. 1974), *cert. denied* 419 U.S. 869 (1974); *see Miniard v. Lewis, supra,* 387 F.2d at 865, n.5; *United Marine Division I.L.A., Local 333, A.F. of L. v. Essex Transportation Co., supra,* 216 F.2d at 412. That is because trustees, as fiduciaries, are required to exercise independent judgment in administering trust funds established under Section 302(c)(5). They must act, in all instances, solely in the interest of the beneficiaries of the funds. *Id.* Indeed, they may not be removed except when they fail to do so. *Lamb v. Carey, supra,* 498 F.2d at 794.

Lamb v. Carey, supra, well illustrates the relationship between a trustee's representative and fiduciary capacities. In that case, the District of Columbia Circuit recognized that communication between a trustee and his appointing party is essential to informed decisions in the best interests of the trust beneficiaries. *Id.* at 793. The Court emphasized, however, that:

> Regardless of their representative relationships, the Trustees of the Fund are still required to act with the highest fiduciary integrity toward the Fund and the beneficiaries.
> [*Lamb v. Carey, supra,* 498 F.2d at 793.]

Accordingly, although it affirmed a district court decision and order removing the UMWA Trustee of the 1950 Fund solely because

his intense political antagonism toward the UMWA management precluded him from representing the UMWA effectively, the Court stated that its decision "does not mean that the Court can remove a trustee whenever the Union expresses dissatisfaction." *Id.* at 794. Indeed, the Court adopted the statement of the district court, in its opinion and order dated February 15, 1973, that:

> The very nature of the Fund . . . is such that its integrity will be undermined if the Union is given the unilateral right to remove the Union Trustee whenever dissatisfaction or differences prompted by personality or political differences prompt the Union's management to seek a change.
> [*Id.* at 794.]

These decisions make it perfectly clear that the role of a trustee in the administration of a trust fund is "of a far different order" from that of a collective bargaining representative in contract negotiations. *Allied Chemical and Alkali Workers of America v. Pittsburgh Plate Glass Co., supra,* 404 U.S. at 170. Indeed, it is obvious from the decisions that there is an "inherent conflict" between a trustee's fiduciary duties to trust beneficiaries and a collective bargaining representative's duty to his appointing party and the bargaining unit. *Nedd v. UMWA,* 556 F.2d 190, 204, 210 (3d Cir. 1977); *see Lamb v. Carey, supra,* 498 F.2d at 789; *Miniard v. Lewis, supra,* 387 F.2d at 864.

A collective bargaining representative is an advocate and an agent. *Morgan v. Laborers Pension Trust, supra,* 433 F.Supp. at 530. Such a representative must, "in conformity with the most basic principles of agency law, follow the instructions and act in the sole interest of his appointing authority." *Sheet Metal Workers International Association,* 234 N.L.R.B. 1238, 1247 (1978), *pet. for review pending,* (5th Cir. 1980) (No. 79-2396); *Local No. 2150, IBEW,* 192 N.L.R.B. 77, 78 (1971). A representative "in the administration of" a trust fund, however, is a fiduciary who must exercise independent judgment and act for "the sole and exclusive benefit" of trust beneficiaries. 29 U.S.C. §186(c)(5); *Lamb v. Carey, supra,* 498 F.2d at 794; *Toensing v. Brown, supra,* 528 F.2d at 72; *United Marine Division, I.L.A., Local 333, A.F. of L. v. Essex Transportation Co., supra,* 216 F.2d at 411-412.

ERISA does not change the law under Section 302(c)(5). Rather, ERISA reaffirms the judicial decisions under Section 302(c)(5), and creates "numerous higher standards for the administration of" trust

funds established thereunder. *Cutaiar v. Marshall*, 590 F.2d 523, 530 (3d Cir. 1979); 29 U.S.C. §1001(b); *see* 126 Cong.Rec. S10104 (daily ed. July 29, 1980) (remarks of Senators Randolph and Williams); 126 Cong.Rec. H7902 (daily ed. August 26, 1980) (remarks of Rep. Thompson).

Consistent with the judicial decisions under Section 302(c)(5), it is the policy of ERISA, "to protect . . . the interests of participants in employee benefit plans and their beneficiaries." 29 U.S.C. §1001(b); *see Arroyo v. United States, supra*, 359 U.S. at 425-426; 93 Cong.Rec. 4678, 4746-4747 (1947). In Section 302(c)(5), however, Congress protects those interests by requiring that employee welfare funds be established as legitimate "trust fund[s]" for the "sole and exclusive benefit" of the beneficiaries and by providing for equal employer representation "in the administration of the [funds]." 29 U.S.C. §186(c)(5). In ERISA, on the other hand, Congress increases the protection by "establishing standards of conduct, responsibility and obligation for fiduciaries" who administer trust funds established in accordance with the requirements of Section 302(c)(5), "and by providing for appropriate remedies, sanctions, and ready access to the Federal courts" in the event of a breach of fiduciary duty. 29 U.S.C. §1001(b); *see* 29 U.S.C. §1001(a).

Under ERISA, a trustee is, by definition, a "fiduciary to the extent" he exercises "any discretionary authority . . . in the administration of such [trust]." 29 U.S.C. §1002(21)(A). And, significantly, ERISA requires a fiduciary to

> . . . discharge his duties . . .
> (a) (1) *solely* in the interest of the participants and beneficiaries and—
> (A) for the *exclusive purpose* of:
> (i) providing benefits to participants and their beneficiaries.
> [29 U.S.C. §1104(a)(1) (emphasis added).]

Consistent therewith, it is obvious that a trustee cannot act, as a collective bargaining representative must, "at the instructions and in the sole interest of" the party who appoints him. *See Sheet Metal Workers International Association, supra*, 234 N.L.R.B. at 1247. Any doubt about this fact is resolved by Section 406(b)(2) of ERISA, 29 U.S.C. §1106(b)(2), and its legislative history. Section 406 provides:

(b) A fiduciary with respect to a plan shall not—

. . .

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries. . . . [29 U.S.C. §1106(b)(2).]

According to the joint explanatory statement of the Conference Committee, this prohibition

> prevents a fiduciary from being put in a position where he has dual loyalties, and, therefore, he cannot act exclusively for the benefit of a plan's participants and beneficiaries. [Conference Report No. 93-1280, 93d Cong., 2d Sess. 309 (1974).]

It is abundantly clear, therefore, that ERISA prohibits a trustee from acting as a "representative" of his appointing party when he functions "in the administration of [the trust]." 29 U.S.C. §§1002(21)(A), 1104(a), 1106(b)(2); *see N.L.R.B. v. Construction and General Laborers' Union Local 1140*, 577 F.2d 16, 21 (8th Cir. 1978); *Morgan v. Laborers Pension Trust, supra*, 433 F.Supp. at 430.

Indeed, the courts that have considered ERISA's requirements have recognized that trustees and collective bargaining representatives function in separate and totally distinct capacities. *N.L.R.B. v. Construction and General Laborers' Union Local 1140, supra*, 577 F.2d at 21; *Morgan v. Laborers Pension Trust, supra*, 433 F.Supp at 430. And, to the extent that a trustee acts to "support the interests of [his appointing] party," he acts "beyond the scope of his authority as a trustee." *N.L.R.B. v. Construction and General Laborers' Union Local 1140, supra*, 577 F.2d at 21. A trustee is not an advocate, but a fiduciary. *Morgan v. Laborers Pension Trust, supra*, 433 F.Supp. at 430; *see Nedd v. UMWA, supra*, 556 F.2d at 209-210. As such, a trustee is required to comply with the fiduciary duties imposed by ERISA. *Id.* A trustee who breaches those fiduciary duties is subject to personal liability and removal by the court under Section 409 of ERISA. 29 U.S.C. §1109; *Marshall v. Snyder*, 572 F.2d 894 (2d Cir. 1978). Under Section 405 of ERISA, a trustee may also be liable for the breach of a co-trustee if he has knowledge of the breach. 29 U.S.C. §1105; *see Marshall v. Craft*, 463 F.Supp. 493, 497 (N.D. Ga. 1978).

The Third Circuit, however, ignored ERISA's requirements, and, contrary to authority, decided that trustees are collective bargaining representatives within the meaning of Section 8(b)(1)(B) of the NLRA. *Amax Coal Company v. N.L.R.B.*, 614 F.2d 872, 881-82 (3d Cir. 1980). If allowed to stand, that decision will adversely affect the very interests that Congress intended to protect: the "interests of participants in employee benefit plans and their beneficiaries." Section 2(b) of ERISA, 29 U.S.C. §1001(b); *see* 29 U.S.C. §1001(a).

Under the decision of the Third Circuit, for example, the UMWA could not bargain to impasse on the continued participation of 1786 independent employers in the Funds unless each employer were given the right to appoint a trustee. This could result in so many trustees that the Funds would become impossible to administer. It is more likely, however, that it would result in the discontinuation of the Funds and the establishment of single employer plans. This result would be detrimental to the participants because it would expose them to the higher costs and risks of single employer plans and deprive them of the portability offered by the Funds. *See Denver Metropolitan Association of Plumbing Contractors v. Plumbers Local No. 3*, 586 F.2d 1367, 1373-1375 (10th Cir. 1978); *Sheet Metal Workers International Association, supra*.

In enacting the Multiemployer Pension Plan Amendments Act of 1980, Pub.L.No. 96-364 (Sept. 30, 1980) (hereinafter the "Act"), Congress recognized the substantial interest of participants in the continued existence of multiemployer funds. Indeed, Congress specifically found that:

> (3) the continued well-being and security of millions of employees, retirees, and their dependents are directly affected by multiemployer pension plans; and
> (4)(A) withdrawals of contributing employers from a multiemployer pension plan frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the plan, its participants and beneficiaries, and labor-management relations. . . . [*Id.*, Section 3(a)(3), (4)(A).]

Accordingly, Congress declared it to be the policy of the Act "to alleviate certain problems which tend to discourage the maintenance and growth of multiemployer pension plans. . . ." *Id.*, Section 3(c)(2). It is readily apparent, therefore, that the decision of the

Third Circuit in this respect, as in all others, directly conflicts with Congressional intent.

Indeed, the legislative history of the Act reveals that it was the intent of Congress to reaffirm the present law, "that these plan trustees as fiduciaries have sole responsibility to the participants and beneficiaries of the plan." 126 Cong.Rec. H7902 (daily ed. August 26, 1980) (remarks of Rep. Thompson). Accordingly, Representative Thompson viewed the Third Circuit's decision as "an erroneous interpretation of both ERISA and federal labor law" that "does not reflect congressional intent." *Id.* Senators Randolph and Williams agreed that Congress had never intended that "an agency status should or does exist between trustees and their appointers." 126 Cong.Rec. S10104 (daily ed. July 29, 1980) (remarks of Senators Randolph and Williams).[2]

These recent statements, standing alone, may not be determinative of the Congressional intent in enacting Section 302(c)(5) of the LMRA and Sections 404 and 406 of ERISA. The statements are, however, wholly consistent with Section 302(c)(5) of the LMRA and ERISA, their legislative histories, and the judicial decisions thereunder. Indeed, it could not be more obvious that the decision of the Third Circuit conflicts with all authority.

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[2]Senator Williams was the Chairman of the Senate Committee on Labor and Human Resources and the floor manager of the Act. Senator Randolph was the second-ranking democrat on the Committee. Representative Thompson was the Chairman of the House Sub-committee on Labor Management Relations and the floor manager during House debates on the Act.

CONCLUSION

Upon the foregoing, it is respectfully submitted that the Supreme Court should reverse the decision of the Third Circuit and remand the case with instructions to enforce the order of the Board.

Respectfully submitted,

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